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Supreme Court, U.S.
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No. 99-60

IN THE

Supreme Court of the United States

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT and CITY OF MEMPHIS, TENNESSEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a plaintiff-landowner, through its own procedural errors, fails to prosecute its case properly in state courts, should the courts of the federal system be required to assume appellate jurisdiction of state court rulings in order to grant such plaintiff-landowners an additional forum in which to litigate their claims?

2. Was the application of Tennessee law to the Petitioner's federal and state claims either: (i) facially unconstitutional; (ii) inadequate for full litigation of a constitutional claim; or (iii) practically inadequate though theoretically adequate, as required to obtain federal review of substantive state court rulings under this Court's holding in *Allen v. McCurry*, 449 U.S. 90 (1980).

3. Because the petitioner's procedural errors and omissions in state court were the cause of its inability to make a full progression through the Tennessee state court mechanisms for obtaining just compensation, does the plain language of this Court's holding in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985) preclude the petitioner from seeking federal relief under 42 U.S.C. § 1983?

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OPINIONS BELOW

On April 5, 1999, the Court of Appeals for the Sixth Circuit filed a decision affirming the granting of the Defendant's motion to dismiss by the United States District Court for the Western District of Tennessee. (Petitioner's App. A.) On June 18, 1997, the decision of the district court granting the motion to dismiss was filed and reported as *Rainey Brothers Construction Company, Incorporated v. Memphis and Shelby County Board of Adjustment*, 967 F. Supp. 998 (W.D. Tenn. 1997).

STATEMENT OF THE CASE

The Petitioner is the owner of a fourteen-acre tract of land in the eastern area of Memphis, Tennessee. On February 3, 1964, the Petitioner presented to the Memphis City Planning Commission a preliminary plan to develop single-family housing on his land, but was told that the minimum building elevation had been increased. In the Petitioner's opinion, this increase made construction of single family homes economically impossible and it amended the planned construction to involve multi-family homes. After its application for a permit to build 432 apartment units was rejected, the Petitioner eventually obtained permits necessary to undertake construction of 165 apartments at an elevation of 274.9 mean sea level. (Petitioner's App. B, pp. 2-3.)

The Petitioner requested and was granted a hardship variance to allow it to construct the contemplated apartments at an elevation of 270 mean sea level. The Board, however, did so in executive session with no required notice or hearing provided to the neighbors or other interested parties who had the legal right to object to the change in elevation. The

Petitioner began work on the apartment units, including the initial process of framing. (Petitioner's App. B, pp. 3-4.)

On April 28, 1976, an attorney representing objectors to the apartment construction, apparently having found out about the new construction, persuaded the Board of Adjustment to rescind the August, 1975 variance and reinstate the higher elevation requirement. Again the Board acted without notice or hearing. The City forwarded a "Notice of Disposition" advising of the Board's action and indicating that the building elevation had been returned to its original level, 274.9 mean sea level. The Petitioner asked the Board for a rehearing, but was denied. Eventually, the Board and City revoked the Petitioner's permits for construction of the apartments. (Petitioner's App. B, pp. 5-6.)

On May 26, 1976, the Petitioner filed two (2) actions in Tennessee State Courts against the Memphis and Shelby County Board of Adjustment and the City of Memphis, Tennessee. One of the suits sought a writ of certiorari and the second sought money damages under Tennessee law for rescission of the building permits granted to the Petitioner. After these two claims were filed, no further action was taken by the Petitioner until November 14, 1988, *twelve years later*, when it sought and was granted leave to file an amended complaint in each action. The amended complaints significantly increased the damages sought and included specific additional claims for inverse condemnation under Tenn. Code. Ann. § 29-16-123, a takings claim under the federal constitution, and substantive and procedural due process claims under the state and federal constitutions. (Petitioner's App. B, pp. 5-7.)

On August 2, 1989, the Petitioners' additional claims were dismissed by the trial court because, in the court's opinion, they did not "relate back" to the original claims as required by Tenn. R. Civ. P. 15.03. The trial court then granted the Plaintiff's motion for leave to file an interlocutory appeal with the Tennessee Court of Appeals, which affirmed the circuit court's dismissals. Application was made and denied for a writ of certiorari to both the Tennessee Supreme Court and the United States Supreme Court. (Petitioner's App. B, pp. 7-8.)

On April 25, 1994, after the Petitioner's attempt to have its additional claims heard had been rejected by the circuit court, the Tennessee Court of Appeals, the Supreme Court of Tennessee, and the United States Supreme Court, a non-jury trial was begun on the merits of the original state law claims in the circuit court of Shelby County, Tennessee. The circuit court ruled in favor of the Petitioner on May 17, 1994 on the writ of certiorari based on a stipulation by the Board and City that the April 1976 rescission of the variance, like the August 1976 granting of the variance, was granted by the Board without sufficient procedural due process, and therefore, like its August 1975 predecessor, was void or voidable. The trial court then refused to grant monetary relief. (Petitioner's App. B, pp. 8-9.)

On May 27, 1994, the Petitioner filed a notice of appeal with the Tennessee Court of Appeals. Because as of April 18, 1995, Petitioner had failed to file a transcript with the court, the Petitioner's appeal was dismissed with prejudice pursuant to Tenn. R. App. P. 24(b). The Petitioner's application for permission to appeal to the Tennessee Supreme Court was denied. (Petitioner's App. B, p. 9.)

On November 5, 1996, the Petitioner filed an action in the United States District Court for the Western District of Tennessee under 42 U.S.C. § 1983 which asserted a substantive due process claim, a procedural due process claim, and an inverse condemnation claim. (Petitioner's App. B, p. 10.) On June 18, 1997, the district court granted the Board and City's Motion to Dismiss.

The Sixth Circuit Court of Appeals affirmed the decision of the district court in an opinion filed on April 5, 1999.

SUMMARY OF ARGUMENT

A review of the decisions of the various circuits does not demonstrate the confusion and conflict that the Petitioner alleges. The circuits have uniformly held that developers and other takings claimants are subject to the "full faith and credit" statute, 28 U.S.C. § 1738, where the facts of the case are appropriate. Therefore, there is no urgent need for the guidance of this Court regarding the way in which the circuits are to apply the rule of *Williamson County*.

The procedural history of this case in Tennessee courts also makes it a particularly inappropriate candidate for review by this Court. After the Petitioner received adverse judgments in state court, the proper next step in ripening its claims for federal review was to perfect an appeal to the Tennessee Court of Appeals. The Plaintiff failed to perfect such appeal and failed to show good cause why appeal should be allowed despite its procedural error. In this light, the Petitioner's argument that the state of Tennessee somehow created a "procedural morass" which smothered its claims is unavailing. A requirement that a transcript be filed within ninety days of the filing of the notice of appeal is not

unreasonable, and compliance with reasonable procedural guidelines is a prerequisite for a full hearing in any judicial forum. The Petitioner's case has never been ripe for federal hearing because, through its own errors and despite adequate Tennessee judicial provisions, the Petitioner neglected to ripen it.

This Court has held that federal district courts cannot assume appellate jurisdiction over state court judgments. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). To hold otherwise would subject the federal district courts to a flood of litigation involving state court cases which dismissed federal claims for any procedural reason.

As the district court below pointed out, even if the state courts committed an error in applying Tennessee law concerning when a claim properly "relates back" to an earlier complaint, there is no evidence here that the state has unconstitutionally employed a procedural rule to thwart federal rights in a systematic fashion. (Petitioner's App. B, p. 18; citing *Allen v. McCurry*, 449 U.S. 90, 100-101 (1980)). The Petitioner forcefully states that the state of Tennessee subverted its due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, but it has made no persuasive demonstration (merely forceful statements) that the state court mistakes amounted to an unconstitutional denial of a full and fair hearing. At every stage of this case, the Petitioner has had the *opportunity* to ripen its claim as *Williamson County* requires. If the Petitioner has been "trapped," the trap was crafted not by the unconstitutionality of Tennessee state court actions, but by the Petitioner's errors and omissions.

REASONS FOR DENYING THE WRIT

I.

FEDERAL CIRCUIT COURTS HAVE CONSISTENTLY APPLIED THE FULL FAITH AND CREDIT STATUTE TO FEDERAL COURT TAKINGS CLAIMS TO HOLD THAT PLAINTIFFS DO NOT HAVE AN UNFETTERED OPPORTUNITY TO RELITIGATE PREVIOUSLY DECIDED CLAIMS IN FEDERAL COURT.

The Petitioner alleges that certiorari needs to be granted to address a circuit conflict regarding a developer's ability to relitigate issues in federal court after seeking compensation in state court. The circuit conflict posited by the Petitioner simply does not exist. Indeed, the many circuits to address the issue have uniformly ruled that developers and other takings claimants are subject to the federal "full faith and credit" statute (28 U.S.C. § 1738) where appropriate. Not a single case cited by the Petitioner is to the contrary, and no court would have the discretion to ignore 28 U.S.C. § 1738, which is one of the oldest provisions in the United States Code.

The cases cited by the Petitioner establish three entirely consistent rules regarding application of claim and issue preclusion to federal court takings claims. The first rule — and the only rule necessary to support the decision here — is that, absent a reservation of a federal claim by a takings plaintiff, state rules of claim and issue preclusion (or *res judicata* and collateral estoppel, using Petitioner's terms) apply with full force. *See Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.3d 362,

364-365 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 (3rd Cir. 1989). Even the cases relied upon by the Petitioner support this rule. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1309 (11th Cir. 1992) ("state law res judicata principles will bar any federal law claims that were neither raised nor reserved . . . in state court").

Petitioner made no effort to reserve its federal claims while litigating in state court. Thus, the Sixth Circuit's decision to apply Tennessee rules of claim and issue preclusion was consistent with the holding of every other circuit that has considered the issue. Like most states, Tennessee claim preclusion law bars relitigation where the claimant had a "full and fair opportunity" to present the claim in another forum. After ruling that the state court had indeed afforded Petitioner "a full and fair opportunity to litigate its claims," (Petitioner's App. A, p. 6), the Sixth Circuit was required to dismiss the Petitioner's federal court claim.

Fields and the other cases relied upon by the Petitioner to establish its alleged circuit split address the separate question of the application of state claim preclusion rules in cases where a plaintiff "reserves" a federal takings claim while litigating in state court. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998). *Fields*, *Front Royal* and the Ninth Circuit's ruling in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir 1995) ("*Dodd I*") stand for the proposition that a plaintiff can reserve a takings claim in state court to preserve access to a federal forum. *See Dodd I*, 59 F.3d at 862; *Fields*, 953 F.2d at 1306; *Front Royal*, 135 F.3d at 283 (quoting *Fields*). *Dodd I* and *Fields* go one step further and

hold that where a takings plaintiff successfully reserves a federal claim in state court, the federal court is not obliged to apply claim preclusion to "extinguish the entire [federal] claim." *Dodd I*, 59 F.3d at 861-62; *Fields*, 953 F.2d 1299.

Dodd I and *Dodd v. Hood River County*, 136 F.3d 1219, 1227 (9th Cir.), *cert. denied*, 119 S. Ct. 298 (1998) (*Dodd II*) address a third issue: whether a takings plaintiff, in federal court after successfully reserving a federal claim in state court, can relitigate the precise issues decided by the state court. The Ninth Circuit ruled that where plaintiffs "fully litigated a necessary issue in the course of the state proceedings" issue preclusion applies to prevent "a second bite at the same apple." *Dodd II*, 136 F.3d at 1227; *see also Dodd I*, 59 F.3d at 863; *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1073-74 (3d Cir. 1990); Restatement (Second) of Judgments § 86, comment f, illustration 7 (1982).

Applying issue preclusion, *Dodd II* held that Oregon and federal law were identical in determining whether a per se taking occurred under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Thus, the court gave full faith and credit to the state court's determination on this issue. 136 F.3d at 1229-30. Finding that Oregon law differed from federal law on whether a taking occurred under the multi-factored inquiry of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the court addressed the merits of that claim, rejecting it because the environmental protections at issue were reasonable and the owners lacked investment-backed expectations to use their property in a manner that contravened pre-existing rules.[1]

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1. Petitioner's discussion of *Dodd I* and *Dodd II* is remarkably disingenuous. Contrary to petitioner's contention, there was neither (Cont'd)

In short, the lower courts have effectively and consistently applied the "full faith and credit" statute to takings claims in federal court after adjudication under state procedures. The circuits have carefully preserved a federal forum for property owners by allowing a reservation of a federal claim and, where a reservation is made, relaxing the rule of claim preclusion. At the same time, circuits have refused to permit wasteful federal court relitigation of issues fully and fairly resolved in a state forum. The circuits have struck "a delicate balance between the interests of the defendant and of the courts in bringing litigation to a close and the interests of the plaintiff in the vindication of a just claim." *Dodd I*, 59 F.3d at 862. There is no reason for this Court to upset this delicate balance.[2]

(Cont'd)

a "bait" in *Dodd I* nor a "switch" in *Dodd II*. *See* Petition at 9 n.5 & 15. Both cases, written by the same judge, hold the same thing: a "reservation" of a federal takings claim prevents application of claim preclusion but does not prevent preclusion of issues actually litigated in the state forum. Compare *Dodd I*, 59 F.3d at 863 with *Dodd II*, 136 F.3d at 1227. Moreover, contrary to Petitioner's assertion (Petition at 15), the Ninth Circuit did not simply affirm the district court's dismissal of Dodd's claim based on issue preclusion. *Dodd II*, 136 F.3d. at 1228. The Ninth Circuit limited the district court's preclusion ruling and addressed and rejected the crux of Dodd's claim on the merits. Finally, Petitioners fail to point out that this Court was offered and declined an opportunity to review *Dodd II*. *See* 119 S. Ct. 298 (1998).

2. Nor is there any reason to "reconsider" *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985) (Petition at 22), which this Court emphatically reaffirmed just months ago. *City of Monterey v. Del Monte Dunes*, 119 S. Ct. 1624 (1999).

Petitioner's claim reduces to the mistaken proposition that it should have an unfettered right to litigate its takings claim in federal court. This Court in *Allen v. McCurry*, 449 U.S. 90 (1980) expressly rejected this contention. *Allen* upheld a federal court's application of issue preclusion to bar a criminal defendant from relitigating, through a 42 U.S.C. § 1983 claim, a Fourth Amendment search and seizure claim that was rejected by the state court in the course of the state criminal proceedings. The Court specifically rejected the "generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Id.* at 100. The Court reasoned:

> [t]he authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself. For reasons already discussed at length, nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights.

Allen, 449 U.S. at 103-04 (footnotes and citations omitted).

This Court also ruled in *Allen* that it made no difference that the plaintiff's forum for the initial litigation of the claim was imposed upon him, commenting:

> [t]here is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Allen, 449 U.S. at 104 (footnotes omitted).

Finally, the *Allen* court emphatically rejected the notion, advanced by Petitioner here, that state courts are incapable of enforcing federal constitutional rights. *See Allen*, 449 U.S. at 105; *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (citation omitted) ("a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights . . .")

This Court has repeatedly held that application of the doctrines of claim and issue preclusion in actions under § 1983 reduces wasteful relitigation and "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96. By suggesting that these doctrines should be eliminated in takings cases, Petitioner is seeking preferential treatment — a chance to get two bites at the apple — that has been denied to criminal defendants and other constitutional claimants.[3]

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3. The *Allen* court also expressly rejected the Petitioner's argument that takings claimants should be given the same right to relitigate claims as that afforded to habeas petitioners. *See* Petition at 27-28. As *Allen* states, the traditional exception to res judicata

(Cont'd)

II.

THE PETITIONER'S PROCEDURAL LAPSES IN TENNESSEE STATE COURT MAKE THIS A PARTICULARLY INAPPROPRIATE CASE FOR THIS COURT TO REVIEW.

As documented above, there simply is no confusion or conflict among the circuits regarding the application of the Full Faith and Credit statute to the rule set forth by the Court in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985). Even if the Court were inclined to give guidance on this subject matter, however, the Petitioner's own procedural mistakes in the Tennessee state court case make this action a wholly ineffective candidate for this Court's review. In its strident outline of the "procedural morass" wrought by Tennessee state courts, the Petitioner has conveniently glossed over its own fundamental missteps.

The Petitioner's self-induced procedural misadventure began after it filed two actions (one which sought money damages and another which sought a writ of certiorari) in 1976 and then waited *twelve years* to pursue these actions at all. Until November 14, 1988, the Petitioner took no steps to advance its cause of action. While the Petitioner has correctly pointed out that "regulatory taking cases can be time consuming" (Pet., p. 1), an absolute standstill spanning twelve years is difficult for any court to fathom. Despite the

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for habeas corpus review, *see Preiser v. Rodrigues*, 411 U.S. 475, 497 (1973), provides no analogy to § 1983 cases, since that exception finds its source in the unique purpose of habeas corpus — to release the applicant for the writ from unlawful confinement." *Allen*, 449 U.S. at 98, n.12 (citation omitted).

unexplained delay, the Petitioner was granted leave by the trial court to add several state and federal claims. (Petitioner's App. B, p. 6.) On motion of the Board of Adjustment and City of Memphis, the amendments to Petitioner's original complaints were dismissed. After appeal of the dismissal of the amendments, the claims of the Petitioner as set forth in 1976 were eventually considered on the merits by the circuit court of Shelby County, Tennessee. After that hearing, a decision was rendered in favor of the Petitioner, but no compensation was awarded. (Petitioner's App. B, p. 8-9.)

Feeling aggrieved, the Petitioner filed a notice of appeal in the Tennessee Court of Appeals on May 27, 1994. However, despite the requirement found in Tenn. R. App. P. 24(b) that an appellant file a transcript with the court within ninety days, no transcript had been filed by April 7, 1995, some ten months after the notice of appeal was filed. For that reason, the appeal was dismissed with prejudice on April 18, 1995, and the Petitioner began its quest for a federal forum. (Petitioner's App. B, p. 9.)

In light of this procedural background, the Petitioner's obstinate desire to be heard in a federal forum closely resembles a desire to obtain a bite at a fresh apple after having negligently lost the one it was first given. In *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), this Court defined the "full and fair opportunity" requirement by stating that the "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. The state courts of Tennessee meet and exceed this definition as a capable forum of providing relief to the Petitioner. Because of procedural errors, the Petitioner

failed to avail itself of the full and fair opportunity presented to ripen its case for federal hearing pursuant to the rule of *Williamson County*. Therefore, the Petitioner's claims do not merit a reconsideration of the mechanics of the *Williamson* rule.

In Section I(A) of its brief, the Petitioner emphasizes the fact that the rule of *Williamson County* contains a clear temporal element:

> The *Williamson County* opinion then goes on the say that because of the lack of both a final administrative decision and the absence of an attempt to seek compensation in state court, ". . . respondent's claim is not ripe." (473 U.S. at 186) Please note again that the phrase chosen was "not ripe" rather than "dead." Absence of ripeness necessarily means that things need to — and can — be done to make the matter ripe.

(Pet., p. 11.)

Indeed, there are things that "need to — and can — be done" to ripen a claim. The Petitioner's primary difficulty is that it needed to do these things, could have done them, but did not. Throughout the Tennessee state court proceedings, a full and fair opportunity was present to ripen federal claims by proper progression through the state system. The Petitioner's claim was not dead until allowed to die on the vine through Petitioner's own procedural neglect.

Thus, the decisions of the two federal tribunals which have ruled on this case have not discounted the mandate of "not yet" and "not until" emphasized in the Petitioner's brief.

These courts have simply recognized that the Petitioner's actions played an important role in creating its current difficulty.

The Petitioner also urges, in Section I(B) of its brief, that the district court undertook a "mechanical application of preclusion rules" which was subsequently affirmed by the Sixth Circuit. (Pet., p. 14.) However, it is clear from the district court's order that it undertook a considered analysis of the relevant case law regarding *res judicata* principles and did not blindly grant preclusive effect to the rulings of the Tennessee state courts. The court stated that:

> Under Tennessee law, a previous action is given preclusive *res judicata* effect if: (1) the underlying judgment was rendered by a court of competent jurisdiction; (2) the same parties were involved in both suits; (3) the same cause of action was involved in both suits; (4) the underlying judgment was on the merits. (Citations omitted.)

Rainey Bros. v. Memphis and Shelby Cty Bd. of Adjust., 967 F. Supp. 998, 1003 (1997).

In analyzing the Tennessee *res judicata* principles and concluding that these principles should apply to enact a final enforcement of the state court judgments against the Plaintiff, the district court wrote as follows:

> [I]t is beyond dispute that the Tennessee state courts have jurisdiction to hear federal statutory and constitutional claims. Nor is there any dispute that the same parties involved in this case were also parties to the state court action. Likewise,

> there is no question that Plaintiff seeks to assert in this case the exact claims that were previously raised and dismissed by the state courts pursuant to Tenn R. Civ. Pro. 12.02(6). Finally, it is well settled that an order of dismissal granted pursuant to Tenn. R. Civ. Pro. 12.02(6) is a decision on the merits of the case.

Id.

From the foregoing, it is clear that the District Court did not, as the Petitioner asserts, blindly grant preclusive effect to the Tennessee judgment because of a mistaken interpretation of *Williamson County*. The district court interpreted and applied the relevant Tennessee precedent regarding *res judicata* preclusion and utilized that reasoning to grant full faith and credit to the ruling of the Tennessee circuit court.

In fact, it is evident from the district court's opinion that the Petitioner's missed appeal deadline was a major factor in the decision to grant the motion to dismiss of the Board of Adjustment and City of Memphis. The court stated that:

> [E]ven if this Court could review this decision under certain circumstances, the Court would decline to do so under the circumstances of this case. As noted above, plaintiff's state appeal from the Circuit Court's decision to dismiss its damage claim was dismissed on the grounds that plaintiff had failed to file the transcript pursuant to Tenn. R. App. P. 24(a). In essence, therefore, plaintiff

> has procedurally defaulted whatever argument it may have had to assert a claim in this Court.

Rainey Bros., 967 F. Supp. 998, 1006 (6th Cir. 1997).

To grant the Petitioner's application for certiorari in this case, this Court would be forced to overstep not only its own mandate in *Williamson County*, but also the fact that the Petitioner procedurally defaulted its ability to progress fully through the state courts of Tennessee by overlooking or ignoring the reasonable requirement that a transcript be filed on appeal.

Therefore, this Court should decline the Petitioner's application for review in this case.

III.

BECAUSE, THROUGH DILATORY PRACTICES AND PROCEDURAL ERRORS, THE PETITIONER FAILED TO AVAIL ITSELF OF THE OPPORTUNITIES TO LITIGATE ITS CLAIMS IN TENNESSEE STATE COURTS, THE PLAIN LANGUAGE OF THIS COURT'S HOLDING IN *WILLIAMSON COUNTY* PRECLUDES THE PETITIONER FROM SEEKING FEDERAL RELIEF UNDER 42 U.S.C. § 1983.

In *Williamson County*, this Court stated that "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 196 (1985). The Court set forth two discrete requirements for asserting a federal claim that

government regulation has effected a taking for which the Fifth Amendment requires compensation. A claimant must: (a) properly utilize a state's procedure for providing just compensation; and (b) suffer a denial of compensation. The Petitioner fails the first prong of this test. It did not properly utilize Tennessee procedure for compensation. Rather, through its procedural nonchalance, it forfeited the opportunity to ripen its claim for federal hearing.

Accordingly, the Petitioner cannot argue with any authority that the subsequent actions of the state courts of Tennessee were unconstitutional. Even though these courts did not grant monetary compensation to the Petitioner, they provided a full opportunity for the Petitioner to ripen its claims for future federal hearing. To ripen a claim under the rule of *Williamson County*, the important factors are: (a) fully utilizing state procedures which are adequate for compensation; and (b) being finally denied compensation after full use of state procedures.

A fortiori, because the Petitioner defaulted its ability to test the adequacy of Tennessee's procedure for compensation, it cannot assert a federal claim for violation of the Just Compensation Clause under the rule of *Williamson County*. The Petitioner simply cannot make a powerful claim that it was subjected to a gross denial of a fair hearing when its own appeal failed because it disregarded the Tennessee Rules of Appellate Procedure.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States District Court for the Western District of Tennessee, as well as the judgment of the United States Court of Appeals for the Sixth Circuit dismissing the Petitioner's claims, should be affirmed and this appeal dismissed. The petition for a writ of certiorari fails to state a special, important reason for review, pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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